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Supreme Court, U.S.
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No. 04-971

In The

Supreme Court of the United States

SERRA CANYON COMPANY, LTD.,

Petitioner,

v.

CALIFORNIA COASTAL COMMISSION, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal For The Second Appellate District

AMICUS CURIAE BRIEF OF DAVID HARNER IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

This amicus curiae brief of David Harner (Harner) is filed pursuant to Supreme Court Rule 37.2(a) in support of Petitioner Serra Canyon Company, Ltd.

Counsel for Petitioner has consented to the filing of this brief and that consent has been lodged with the clerk of this Court. Counsel for Respondent California Coastal Commission has also consented to the filing of this brief and a copy of that consent has been lodged with the clerk of this Court. Upon information and belief, Respondent's original consent letter was sent directly to this Court.

Harner is the owner of real property in Malibu, California. Harner's property falls within California's coastal zone, thus being subjected to Respondent's jurisdiction. The previous owner of Harner's property was forced by Respondent to execute and record an offer to dedicate an easement to the public or face the threat of not being able to build on the property. The offer to dedicate was executed on January 13, 1984, recorded on February 16, 1984, and was to expire 21 years after the recordation date.

In 1997, Harner purchased his Malibu property. Since purchasing the property, Harner has freely used and excluded others from his property. Harner did not know about the previously-executed offer to dedicate and has freely used and excluded others from that portion of his

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae David Harner affirms that no counsel for any party to this case authored this brief in whole or in part. Mr. Harner further affirms that no person or entity, other than amicus curiae or his counsel, made a monetary contribution to the preparation or submission of this brief.

property as well. Twenty years after the recordation of the offer to dedicate, on June 10, 2004, Access for All, an entity approved by Respondent, recorded an acceptance of the offer to dedicate.

In 1987, this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (1987), condemned as "an out-and-out plan of extortion" a decision in which Respondent approved a building permit on the condition that the property owner convey a public easement wholly unrelated to any adverse impacts caused by the owner's proposed building project. The California Court of Appeal's opinion in the present case, *Serra Canyon Company, Ltd. v. California Coastal Commission, et al.*, 16 Cal. Rptr. 3d 110 (Ct. App. 2004), prevents Harner from availing himself of the constitutional protections which this Court outlined in *Nollan*.

The Court of Appeal's opinion in this case held that it was Respondent's 1981 permit that "contains the condition that [Petitioner] now finds noxious," and that, under California law, a challenge to a final permit approval decision must be brought within 60 days of the approval of the permit. *Serra Canyon*, 116 Cal. Rptr. at 113. Harner believes that the rule articulated by the California Court of Appeal unreasonably burdens those who own property at the time the noxious condition is imposed and denies subsequent owners their Fifth Amendment right to meaningfully challenge confiscatory governmental action. The new rule also shifts the financial burden for implementing government policy from the public as a whole to individual private property owners.

OPINION BELOW

The opinion of the Court of Appeal of the State of California was entered June 15, 2004 and is published at 120 Cal. App. 4th 663 (2004) and 16 Cal. Rptr. 3d 110 (Ct. App. 2004). Pet. App. 1a-11a. The California Supreme Court denied the petition for review of the Court of Appeal's decision on October 20, 2004. Pet. App. 19a. The decision of the Los Angeles County Superior Court denying Petitioner's prayer for a writ of mandate is not reported. Pet. App. 12a-18a.

STATEMENT OF THE CASE

The facts of this case, as set forth in the Petition for a Writ of Certiorari (Petition) and herein adopted, raise the issue of

> whether the California Coastal Commission and other state entities may thwart *Nollan*'s holding by accepting offers to dedicate wholly unrelated property that were coerced prior to *Nollan*, then invoking a 60-day statute of limitations as to the original Commission decision imposing the condition to bar any challenge to acceptance of the offer, even though the property owner did not lose the right to possess and exclude others from the property until the offer to dedicate was accepted, and any takings claim challenging the loss of these rights brought within 60 days of the Commission's decision would have been unripe.

Petition at (i).

SUMMARY OF ARGUMENT

The California Court of Appeal determined that Petitioner could not in response to the acceptance by the California Coastal Conservancy of an offer to dedicate assert a valid inverse condemnation claim because such a claim should have been brought within 60 days of when the offer to dedicate condition was imposed. *Serra Canyon*, 116 Cal. Rptr. at 113. The Court adopted a bright-line rule which denies a large segment of private property owners their Fifth Amendment right to meaningfully challenge a physical taking. The rule also impermissibly shifts the financial burden of government policy from the public as a whole to private property owners. The far-reaching implications of the California Court of Appeal's ruling make it imperative that this Court grant certiorari to protect the constitutional rights of private property owners.

ARGUMENT

I.

THE BRIGHT-LINE RULE DEVISED BY THE CALIFORNIA COURT DENIES LANDOWNERS THE RIGHT TO MEANINGFULLY CHALLENGE A PHYSICAL TAKING

The just compensation clause of the Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, requires that government compensate property owners when private property is taken for public use. U.S. Const. amends. V and XIV. In the present case, the property will be physically occupied in its entirety by the conversion of Petitioner's interest into a public park. Petition at 7. The

physical occupation of property is a *per se* taking. *Loretto v. Manhattan CATV Corp.*, 458 U.S. 419 (1982).

If this Court does not step in, there will be no opportunity for Petitioner and others similarly situated to challenge the physical taking of their property. The fact that the Constitution does not specify a particular procedure for implementing the Fifth Amendment's guarantee of just compensation allows states to "experiment in the implementation of [the Fifth Amendment]." *San Diego Gas & Electric Company v. City of San Diego*, 450 U.S. 621, 660 (1981) (Brennan, J., dissenting). However, the "chosen procedures and remedies [must] comport with the fundamental constitutional command. The only constitutional requirement is that the landowner must be able meaningfully to challenge a regulation that allegedly affects a 'taking.'" *Id.* Where a state actor does not condemn land but takes it by a continuing process, the owner is not required to resort to either piecemeal or premature litigation to recover just compensation. *United States v. Dickinson*, 331 U.S. 745, 749 (1947).

This Court's holding in *Dickinson* supports the proposition that, when a state actor causes a physical taking to occur, the owner should not be required to bring a piecemeal or premature litigation. Adamson Companies (Adamson), the predecessor in interest in the present case, could not have brought a ripe claim for a physical taking as Adamson was still able to use and exclude others from the subject property. Petition at 10. Accordingly, such litigation would have been premature. Additionally, this Court has held: "It would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the claim ripe were not taken, or could not have been

taken, by a previous owner." *Palazzolo v. Rhode Island*, 533 U.S. 606, 628 (2001).

Although a property owner conceivably may have sufficient interest to bring a claim when the offer to dedicate is required, there is no requirement that for purposes of a physical takings claim that an owner bring his suit when a taking is threatened. *Dickinson,* 331 U.S. at 749. On the contrary, the owner is allowed to wait until the threat has so manifested itself that the "situation becomes stabilized" and "a final account may be struck." *Id.* In the present case, the situation only stabilized or approached finality when the California Coastal Conservancy indicated that it would accept the offer to dedicate. Such a step would deprive Petitioner of its use and ability to exclude others from the property, thus securing a taking rather than merely having the option to take.

II.

INDIVIDUAL PROPERTY OWNERS CANNOT BE REQUIRED TO BEAR THE COST OF IMPLEMENTING GOVERNMENT POLICY

Takings jurisprudence seeks to prevent individual property owners from bearing a financial burden which is more appropriately shared by the public as a whole. *See Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893) (the public is prevented from "loading upon one individual more than his just share of the burdens of government"); *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (the just compensation clause was designed "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole"). Failure

to compensate private property owners whose land is used to implement government policies violates the Fifth Amendment and results in a windfall to the public at the expense of private property owners.

Government must attempt to harmonize the pursuit of environmental and other social objectives with the Fifth Amendment's requirement of just compensation. That goal cannot be achieved with rules which prevent private property owners from seeking just compensation when acceptance of an offer to dedicate results in a physical taking. The rule adopted by the California Court of Appeal in this case unconstitutionally narrows the protection guaranteed by the Fifth Amendment.

More than 100 years ago, Supreme Court Justice Bradley argued for a liberal construction of constitutional provisions securing property rights.

> [I]llegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Boyd v. United States, 116 U.S. 616, 635 (1886). By requiring Respondent to comply with constitutional principles protecting property rights, the burden of its policies will not be wholly borne by individual property owners, but

more fairly by the public as a whole, who will benefit from such policies.

CONCLUSION

For the foregoing reasons, Harner respectfully requests that this Court grant the Petition for a Writ of Certiorari in this case.

DATED: April 7, 2005.

Respectfully submitted,

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